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In the Supreme Court of the United States

OCTOBER TERM, 1992

ERNESTO RAMIREZ-LUJAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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31 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the policy of the United States Border Patrol of stopping all vehicles that travel on Pinon Road, a back road in the Texas-Mexico border area that bypasses the border checkpoint, is illegal and in violation of the Fourth Amendment to the United States Constitution and conflicts with applicable decisions of this Court.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERNESTO RAMIREZ-LUJAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Ernesto Ramirez-Lujan respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 23, 1992, styled United States of America v. Ernesto Ramirez-Lujan, 976 F.2d 930 (5th Cir. 1992).

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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OPINION BELOW

The published opinion of the court of appeals, styled *United States of America v. Ernesto Ramirez-Lujan*, 976 F.2d 930 (5th Cir. 1992), was entered on October 23, 1992. A copy of the opinion is attached hereto as Appendix A.

On November 18, 1992, the court of appeals denied appellant's suggestion for rehearing en banc. A copy of the order is attached hereto as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 23, 1992. Thereafter, on November 18, 1992, appellant's suggestion for rehearing en banc was denied. This petition is filed within ninety (90) days from the date of the denial of said suggestion. SUP.CT.R. 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The basis for federal jurisdiction in the court of first instance was Title 18 U.S.C. § 3231.

Wesley Coleman (Coleman), an agent with the United States Border Patrol, testified that he has worked the Desert Haven 62-180 permanent border patrol checkpoint off and on for three and a half years. This checkpoint is located approximately 25 air miles east of the El Paso, Texas, city limits on Highway 62-180 at Desert Haven, and approximately 35 land miles from the Rio Grande River. Located about three blocks from the checkpoint, within sight, is an unpaved county maintained road, called Pinon Road, that runs north-to-south, branches off, and goes around to Dell City. Pinon Road is approximately one quarter of a mile west of the checkpoint. The surrounding area includes ranches and a pipeline that comes up through the Hueco Mountains, from Hueco Tanks Park Road and crosses Pinon Road, and Coleman stated that he was familiar with "the people who drive up 62-180 kind of on a regular basis or Pinon Road." Coleman also stated that Pinon Road "is notorious for alien smuggling and narcotics" because the checkpoint can be avoided. Coleman also stated that in his opinion, everybody that goes along that road is doing something illegal. On many occasions, both aliens and narcotics have been seized in the area. And, both Dell City and Carlsbad are known areas to law enforcement officials for storing drugs while awaiting distribution. Coleman stated that it is the policy of the United States Border Patrol to stop each and every vehicle that turns off of Highway 62-180 prior to entering the checkpoint and proceeds north on Pinon Road because "it is a way to avoid the checkpoint."[1]

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[1] Coleman admitted that this was not a written policy of the Border

On October 10, 1991, at approximately 6:30 a.m., Coleman was advised that a vehicle, a late 1970's three quarter ton Chevrolet pickup, had veered off of Highway 62-180 north onto Pinon Road. Coleman got into his marked border patrol vehicle and proceeded to the area where the vehicle had been seen. Approximately four miles north on Pinon Road, just past where the pipeline comes out on Pinon, Coleman activated the red lights on his vehicle and stopped the pickup.[2] Coleman approached the vehicle and observed the lone occupant, identified as appellant, sitting in the driver's seat. Coleman questioned appellant as to his citizenship, and appellant stepped out of the vehicle and handed Coleman a valid permanent resident alien's card. Coleman observed that appellant "was visibly very nervous, his knees were shaking, suspicious." When asked where he was going, appellant stated that he was going to a ranch. Coleman did not have radio contact because of the mountainous terrain and was not able to confirm if the permanent resident alien card was valid or if the vehicle that appellant was driving had been stolen.[3] Appellant was ordered back to the checkpoint for further investigation. It took about five minutes to travel the four miles back to the checkpoint. Once there, Coleman took appellant

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Footnote continued.

Patrol but rather the policy of "[d]ifferent supervisors of different shifts, different agents."

The district court made a specific finding that "[t]he United States Border Patrol has a policy of stopping vehicles using Pinon Road that are not recognized as belonging to the local residents. This policy is in place because of the large number of smugglers known to use Pinon Road.

[2] Coleman admitted that the only reason he stopped the vehicle was his policy of stopping every vehicle that turns on Pinon Road.

[3] Coleman stated that he was not sure if the vehicle had been stolen because appellant had stated that the vehicle was not his.

into the trailer to run some checks[4] on him, while the other two agents remained outside and immediately began to inspect the vehicle. Coleman stated that initially, he was informed "that the card was stolen and that the individual was wanted." However, the information proved to be false, i.e., relating to another individual. Appellant was then taken outside to his truck where the K-9 made a positive alert near the gas tank of the vehicle. The agents discovered a false bed in the truck containing approximately 308 pounds of marijuana. Appellant was then formally arrested and read his *Miranda*[5] rights. A search of his person revealed $1330.00 in cash. Appellant, the truck, the money, and the marijuana were then turned over to the DEA in El Paso, Texas.

On October 17, 1991, appellant was charged by indictment with the offense of knowingly and intentionally possessing with intent to distribute more than one hundred (100) kilograms of marijuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1).

Appellant filed a motion to suppress the evidence, alleging that the discovery of marijuana in his vehicle was the result of an illegal search and seizure conducted by border patrol agents. On January 21, 1992, after hearing evidence, the district court denied said motion. Appellant then waived his right to a jury trial, and was found guilty by the court as charged in the indictment.

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[4] Coleman stated that he ran "a central office check, which is an immigration history records check" to "determine whether a card is invalid or has been priorly deported, or immigration records." He also ran a criminal wants and warrants check through NCIC.

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

On February 18, 1992, the district court sentenced appellant to sixty-three (63) months imprisonment, followed by four (4) years of supervised release and a special assessment of $50.00.

On appeal, appellant argued that the policy of the United States Border Patrol whereby agents stop every vehicle that was found to be travelling on Pinon Road, a back road in the Texas-Mexico border that bypasses the border checkpoint, could not be reconciled with the protections of the Fourth Amendment to the Constitution of the United States.

A panel of the United States Court of Appeals for the Fifth Circuit affirmed appellant's conviction, holding that the evidence was admissible under the good faith exception to the exclusionary rule. *United States v. Ramirez-Lujan*, 976 F.2d 930 (5th Cir. 1992). The panel did not address whether the stop was constitutional. *Id.*, at 934 n. 4. Instead, the panel reasoned that under all the circumstances,[6] agent Coleman acted with an objectively reasonable good faith belief that he had a reasonable articulable suspicion that legally justified stopping Ramirez on Pinon Road. *Id.*, at p. 934.

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[6] These circumstances were: (1) it was unusual for Ramirez's truck to be on Pinon Road at that time; (2) the truck did not belong to a Pinon Road resident or to one of their employees; (3) an agent could reasonably believe that a truck, on seeing the checkpoint, turned off the road with the intent to avoid the checkpoint; (4) the notoriety of the road's use for illegal activity and to avoid the checkpoint; and, (5) the fact that Pinon Road is basically a road to nowhere. *Ramirez-Lujan*, 976 F.2d at 933 34.

REASONS FOR GRANTING THE WRIT

I. THE POLICY OF THE UNITED STATES BORDER PATROL OF STOPPING ALL VEHICLES THAT TRAVEL ON PINON ROAD, A BACK ROAD IN THE TEXAS-MEXICO BORDER AREA THAT BYPASSES THE BORDER CHECKPOINT, IS ILLEGAL AND IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CONFLICTS WITH APPLICABLE DESIONS OF THIS COURT.

This Court has held that "[e]xcept at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the Country." *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S.Ct. 2574, 2582, 45 L.Ed.2d 607 (1975). *See also United States v. Ortiz*, 422 U.S. 891, 896-97, 95 S.Ct. 2585, 2589, 45 L.Ed.2d 623 (1975). The same requirement must be met if the vehicle contains contraband rather than illegal aliens. *United States v. Cortez*, 449 U.S. 411, 422, 101 S.Ct. 690, 697, 66 L.Ed.2d 621 (1981) (referring to reasonable suspicion of "criminal activity" generally rather than transportation of illegal aliens specifically). The stop in the present case was not a border search and can only be justified as a brief investigatory detention (also known as "Terry" detentions). *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In order to justify an investigative stop, an officer, under an objective standard, "must be able to point to specific and articulable facts which, taken together with natural inferences from those facts, reasonably warrant that intrusion . . ." *Terry v. Ohio*, 392 U.S. at 20-21.

Although "reasonable suspicion can arise from information that is less reliable than required to show probable cause," *Alabama v. White,* 496 U.S. 325, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301 (1990), a police officer "must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch" '." *United States v. Sokolow,* 490 U.S. 1, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) (citing *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 1883). In *United States v. Brignoni-Ponce, supra,* the Court stated that the factors that should be taken into account in deciding whether there is reasonable suspicion to stop a vehicle in the border area included (1) the characteristics of the area in which the vehicle is encountered; (2) proximity to the border; (3) usual patterns of traffic on the road; (4) previous experience with alien traffic; (5) information about recent illegal crossings in the area; (6) behavior of the driver; (7) appearance of the vehicle; and (8) number, appearance or behavior of the passengers. *Id.* at 885, 95 S.Ct. 2582. Courts consider the reasonableness of the officers' suspicion under the "totality of the particular circumstances." *Id.,* at 885 n. 10, 95 S.Ct. at 2582 n. 10.

In the present case, Coleman candidly admitted that the only reason he stopped appellant's vehicle was because it turned onto Pinon Road, and that he was following the policy of the Border Patrol in doing so. This policy is clearly illegal and in violation of the Fourth Amendment to the United States Constitution and conflicts with prior decisions of this Court.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH ANOTHER DECISION OF THAT COURT ON THE SAME MATTER.

In the recent case of *United States v. Castenada,* 951

F.2d 44 (5th Cir. 1992), it was established that on November 1, 1989, at 8:15 p.m., border Patrol Agent Moreno stopped defendant as he was driving south on Welhausen Road near Oilton, Texas, approximately 35 miles from the Mexican border. Welhausen Road is a bumpy, dusty, gravel road that connects Highways 59 and 359. It is used by ranchers and oilfield workers. It is also a well-known artery for drug trafficking and routing illegal aliens. *Id.* at at 45-46.

Moreno had frequently patrolled Welhausen Road during his five years with the Border Patrol, sometimes twice a week. Moreno knew that the road could be used to bypass two United States border checkpoints to avoid detection of illicit alien and drug activities. The Border Patrol had recently been informed that large groups of illegal aliens were being smuggled into the country over the Welhausen Road route. The agency had also made at least four cocaine or marijuana related arrests along this road during the preceding three months. Moreno also indicated that narcotics had been discovered on nearly every road in this rural, south Texas area. Trafficking in people and drugs seems to be a fact of life there. *Id.* at 46, and n. 2.

The day before defendant's arrest, Moreno had received an intelligence report that a group of illegal aliens would be dropped off on Welhausen Road at 8:00 p.m. He waited in the area that night, but no one came. He returned the following evening, on November 1, 1989, and at about 8:15 p.m., observed defendant's welding truck turn on to the Welhausen Road. He decided to follow the truck because it could have been a "lead" or "scout" vehicle for a larger group of illegal aliens to follow. *Id.*

Moreno, with his driver's side window rolled down, followed defendant's truck for about a mile. Moreno

testified that he could detect the faint odor of marijuana while following behind, and decided to stop the truck. A subsequent search revealed 257 pounds of marijuana hidden in the truck. *Id.*

In affirming the district court's denial of defendant's motion to supress, the United States Court of Appeals for the Fifth Circuit first stated the issue presented: "whether, when agent Moreno stopped the truck, he had a reasonable suspicion that Casteneda was engaged in criminal activity." *Id.* The Court went on to state:

> "The propriety of agent Moreno's stop of Casteneda's truck centers on the agent's testimony that he could detect the faint odor of marijuana trailing the truck as he followed with his window open. It is this fact alone which animates a finding of reasonable suspicion; without it, the other *Brignoni-Ponce* factors are suspicion-neutral in this setting. Accepting as true all of the district court's other findings under *Brignoni-Ponce,* agent Moreno could not, as a matter of law, have had a reasonable suspicion that Casteneda was engaged in criminal activity without the added fact that he smelled marijuana while trailing the vehicle. *We must take care not to open Welhausen Road, or any other, to the whimsy of every agent who sees a vehicle using the roadway.* Without the smell, nothing was unusual about Casteneda being on Welhausen Road." (Emphasis added).

Id. at 47. In a footnote, and directly in point with the present case, the Court further stated:

> "At the point when agent Moreno began following Casteneda's truck, and before he smelled the marijuana, Moreno had no better reason to

> surmise that Casteneda was engaged in criminal activity than he did to suspect the driver of any other vehicle on the raod that night. To say that at this point the agent had a reasonable suspicion, sufficient to justify a roving border patrol investigatory stop, would be to say that he could have stopped any vehicle on the road simply because smuggling was common on the road, because the road was fairly close to the Mexican border, and because the road happened to bypass two U.S. border checkpoints. Indeed, were we to accept this view of reasonable suspicion, nothing would prevent law enforcement agents from stopping any vehicle, on any back road in the Texas-Mexico border area; the roads all share the essential characteristics of Welhausen Road."

Id. at 47 n. 4. *See also United States v. Miranda-Enriquez,* 941 F.2d 1081 (10th Cir. 1991), where the United States Court of Appeals for the Tenth Circuit held:

> "Under the government's view of this case, every out-of-state driver traveling on New Mexico Highway 52 at 9:00 p.m. with a dusty car who does not turn her or his head to look for oncoming cars at the intersection of Highway 52, I-25, and U.S. Highway 85, 98 miles from the Mexican border, can be stopped and questioned by the Border Partol. We conclude that this proposition cannot be reconciled with the protections of the Fourth Amendment to the Constitution of the United States."

Id. at 1083.

In the present case, the panel attempted to distinguish *Casteneda* by stating:

> "So far as the opinion reflects, the officer did not testify that he was familiar with the vehicles that regularly used the road or that it was unusual for vehicles to be using the road at 8:00 p.m. While used to avoid checkpoints, the turnoff onto Welhausen Road could not be seen from the checkpoint and was not so close to the checkpoint that turning onto the road could be regarded as analogous to a u-turn."[7]

Ramirez-Lujan, supra, at p. 933.

There is no distinction between *Casteneda* and the present case. The panel opinion permits exactly what *Casteneda* forbids, the stopping by law enforcement officers of any vehicle, on any back road in the Texas-Mexico border area.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents the Court with the important question of whether, and under what circumstances, the good faith exception to the exclusionary rule is applicable to temporary detentions made by border patrol agents.

Although the United States Court of Appeals for the Fifth Circuit has permitted application of the good faith exception to the exclusionary rule to certain otherwise illegal

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[7] The panel opinion attempted to compare what occurred in the present case, i.e., making a legal turn onto an access road that is located close to a checkpoint, with situations where individuals "are seen making a u-turn or similar maneuvers that avoid their passing through visible border patrol chekcpoints." *Id.,* at 933. Petitioner submits that this comparison is not reasonable.

stops by roving border patrol agents, the cases make clear that there must be some other extraneous information relayed to the agent that would take the detention out of the *Brignoni-Ponce* criteria and permit the application of the good faith exception. Without this "other extraneous information, the validity of the detention is simply determined by *Brignoni-Ponce,* without the need to consider the exception. For example, in *United States v. De Leon-Reyna,* 930 F.2d 396 (5th Cir. 1991) (en banc), the Court upheld an otherwise illegal detention of defendant's truck finding that the agent's decision to stop the truck was not unreasonable in light of all the surrounding circumstances, including his good faith reliance on incorrect information received over the radio that the plates on the truck had been issued to another vehicle. Likewise, in *United States v. Garcia,* 942 F.2d 873 (5th Cir. 1991), *cert. denied,* ____U.S. ____, 112 S.Ct. 989, 117 L.Ed.2d 151 (1992), the Court held that erroneous relodex information relayed to the detaining border patrol officer should not be disregarded in determining the availability of the good faith exception. *Id.,* at 876.[8]

Petitioner is not aware of any opinion by this Court, or any other appellate court, where an otherwise illegal detention by border patrol agents has been upheld based upon the good faith exception to the exclusionary rule absent the presence of extraneous information having been relayed to the detaining officer. To do so would legitimize *every* roving border patrol detention without regard to *Brignoni-Ponce.*[9]

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[8] The court went on the hold that even without the rolodex information, there existed articulable, reasonable suspicion of criminal activity to stop defendant's vehicle. *Id.,* at 877.

[9] It is reasonable to assume that a border patrol agent would not make a temporary detention unless he had a good faith belief that the stop was legally based on the requisite reasonable suspicion.

Furthermore, the Court's opinion in the present case provides little guidance to the district courts as to when the good faith exception would be applicable. For example, only one week after the decision in the present case was delivered, the same Court decided *United States v. Diaz*, 977 F.2d 163 (5th Cir. 1992), holding that roving border patrol agents did not have a reasonable, articulable basis for stopping a vehicle, and suppressed the evidence discovered after the stop. In so ruling, the Court stated:

> "We previously have held that merely being on a road frequently used for illegal activity is insufficient to justify an investigative stop [citing *United States v. Casteneda*, 951 F.2d 44 (5th Cir. 1992)]. Were we to rule otherwise, law enforcement agents would be free to stop any vehicle on virtually any road anywhere near the Texas-Mexico border."

Id., at 165. The Court in *Diaz* did not *sua sponte* raise the good faith exception as the Court did in the present case. But it is clear that under the Court's ruling in the present case regarding the good faith exception, a different result could have been reached in *Diaz*.

CONCLUSION

For the foregoing reasons, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ernesto RAMIREZ-LUJAN,
Defendant-Appellant.

NO. 92-8085.

United States Court of Appeals,
Fifth Circuit.

Oct. 23, 1992.

Defendant was convicted for possession of marijuana with intent to distribute by the United States District Court for the Western District of Texas, Lucias Desha Bunton, III, Chief Judge, and defendant appealed. The Court of Appeals, Garwood, Circuit Judge, held that evidence seized by border patrol agent was admissible under good-faith exception to exclusionary rule.

Affirmed.

Joe Edd Boaz, El Paso, Tex., for defendant-appellant.

Richard L. Durbin, Jr., Asst. U.S. Atty., Ronald F. Ederer, U.S. Atty., San Antonio, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before REYNALDO G. GARZA and GARWOOD, Circuit Judges and WERLEIN,* District Judge.

GARWOOD, Circuit Judge:

Defendant-appellant, Ernesto Ramirez-Lujan (Ramirez), appeals his conviction for possession of marihuana with the intent to distribute. His sole challenge is to the admissibility of evidence on the grounds that it was seized after an illegal initial stop by a border patrol agent. Based on the circumstances surrounding the seizure, we find that the evidence was admissible under the good faith exception to the exclusionary rule and we affirm.

Facts and Proceedings Below

Wesley Coleman (Coleman) worked as an agent for the border patrol at the Desert Haven checkpoint, which is on Highway 62-180 about thirty-five miles from the Mexican border and twenty-five miles east of El Paso, Texas. About three blocks west of the checkpoint is a turnoff for Pinon Road. The checkpoint is well marked and can be seen from the Pinon Road turnoff. Pinon Road is a some thirty-five mile long unpaved road stretching from Highway 62-180 to Dell City, Texas.

Pinon Road is generally used as an access road for the few families that live there or for drug and alien smuggling. For nonlocals, it is a road to nowhere since only two

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* District Judge of the Southern District of Texas, sitting by designation.

ranches and a pipeline are within ten or twenty miles of the turnoff from Highway 62-180. Pinon Road is known for alien and drug smuggling because it allows people to proceed to Dell City, which has a reputation as a drug distribution center, from Mexico while avoiding border patrol checkpoints. It is impractical for a person acting lawfully to use Pinon Road to get to Dell City since there is a much faster paved highway via the checkpoint. The people who live or work in Dell City get there by going through the checkpoint; they do not use Pinon Road.

Coleman testified that he had some three years experience at this location, that he was familiar with the families who lived on Pinon Road within ten or twenty miles of the Highway 62-180 turnoff and that he recognized their cars and the cars of most of their employees. He added that Pinon Road is not used much by the Pinon Road residents or their workers around 6:30 in the morning. Sometimes the local people using Pinon Road would drive past the Pinon Road turnoff to the checkpoint to check in with the border patrol before proceeding on Pinon Road. Coleman stated that he has a policy of stopping every car on Pinon Road that he does not recognize.

At 6:30 a.m. on October 10, 1991, Coleman observed Ramirez head east on Highway 62-180 and turn onto Pinon Road in a late 1970's model pickup truck, traveling a little fast on the dirt road. Coleman did not recognize this vehicle as one used by the ranchers or their guests. He decided to investigate.

The officer pursued Ramirez for about four miles. Though trailing closely, Coleman could not identify the license plate number because of the bumpy terrain. Coleman then turned on his red flashing lights and Ramirez pulled over. Ramirez presented a valid permanent resident

alien's card. Ramirez appeared nervous and stated that the truck did not belong to him. Coleman told Ramirez to follow him to the checkpoint so he could verify Ramirez's immigration papers since the terrain precluded radio contact. At the checkpoint, the dog alerted that it smelled contraband and the truck was searched. The search revealed a false panel in the truck containing 308 pounds of marihuana.[1]

Ramirez filed a motion to suppress the fruits of this search, which was denied following an evidentiary hearing. Ramirez was convicted of knowingly and intentionally possessing over 100 kilograms of marihuana with the intent to distribute in violation of 21 U.S.C. § 841(a)(1). He was sentenced to sixty-three months imprisonment and four years supervised release.

Discussion

Ramirez contends that because the stop of his truck violated the Fourth Amendment, the fruits of the stop should be supressed and his conviction overturned. The United States contends, as it did below that Ramirez was attempting to avoid the border patrol checkpoint and that the evidence is admissible because the search was legal or because the search was justified by the good faith exception.

[1] Normally the fruits of illegal searches and seizures are not admissible in the prosecution's case in chief under the exclusionary rule. However, the "good faith exception" to the exclusionary rule allows the admission of the fruits of some illegal stops. Under this doctrine we have

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[1] The initial verification of Ramirez's documents suggested that the truck was stolen and that Ramirez was wanted. This information later proved false.

held that "evidence is not to be suppressed ... where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." *United States v. De Leon-Reyna*, 930 F.2d 396, 400 (5th Cir.1991) (en banc) (quoting *United States v. Williams*, 622 F.2d 830, 840 (5th Cir.1980), *cert. denied*, 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114 (1981)). *See also id.* at 402 (suppression inappropriate where "it would be objectively reasonable for an experienced officer, situated as was" the officer making the stop, "to conclude that there was adequate reasonable suspicion under the *Cortez* [*United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)] standard and that it was hence lawful to stop the vehicle").

The issue on appeal is whether Coleman's initial stop of Ramirez meets either the constitutional test of reasonableness or the good faith exception so that the fruits of the search are admissible. The nature of the stop determines the level of justification required.

[2] Border officers of roving patrol may stop a vehicle only if they are aware of specific articulate facts that create a reasonable suspicion that the vehicle contains illegal aliens or drugs. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 95 S.Ct. 2574, 2582, 45 L.Ed.2d. 607 (1975) (aliens); *United States v. Cortez*, 449 U.S. 411, 422, 101 S.Ct. 690, 697, 66 L.Ed.2d 621 (1981) (drugs and other criminal activity); *United States v. Lopez*, 911 F.2d 1006, 1009 (5th Cir.1990). Factors weighed in a reasonable suspicion test include: 1) characteristics of the area; 2) proximity to the border; 3) usual patterns of traffic and time of day; 4) previous experience with alien or drug smuggling in the area; 5) behavior of driver, including "obvious attempts to evade officers"; 6) appearance or behavior of passengers; 7) appearance of the vehicle; and 8) officer experience. *See Brignoni-Ponce*, 422 U.S. at 885, 95 S.Ct. at 2582.

[3,4] Border patrol officers may stop vehicles at checkpoints without reasonable suspicion. *United States v. Hasette*, 898 F.2d 994, 995 (5th Cir.1990). Temporary stops without reasonable suspicion are also permitted in "u-turn" type situations where people are seen making u-turns or similar maneuvers that avoid their passing through visible border patrol checkpoints, because the maneuver is treated as tantamount to a stop at the checkpoint itself. *Id.* While these cases do not require reasonable suspicion of criminal activity *as such*, they appear to be inferentially grounded on the assumption that a u-turn type maneuver within sight of the checkpoint being approached gives rise to the reasonable suspicion that it is taken to avoid going through the checkpoint.[2]

In *United States v. Casteneda*, 951 F.2d 44 (5th Cir.1992), this Court upheld a stop on Welhausen Road, a gravel road notoriously used to avoid two border patrol checkpoints. In *Casteneda*, the officer smelled a faint odor of marihuana coming from the truck in front of him through the open window of his car. The panel said that but for the smell of drugs, the stop was not legal. *Id.* at 47 n. 4.[3] The opinion notes that "[without the smell, nothing was unusual about Casteneda being on Welhausen Road." *Id.* at 47. So far as the opinion reflects, the officer did not testify that he was familiar with the vehicles that regularly used the road or that it was unusual for vehicles to be using the road at 8:00 p.m. While used to avoid checkpoints, the turnoff onto Welhausen Road could not be seen from the checkpoint and was not so close to the checkpoint that

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[2] In *Hasette* the defendant, driving toward the checkpoint, turned off the road into the entrance of an oil field, left his truck, discovered the entrance gate was locked, returned to his vehicle, and drove back in the direction from which he had come.

[3] *Casteneda* did not address the good faith exception of *De Leon-Reyna*, presumably because it ultimately held the stop to have been legal.

turning onto the road could be regarded as analogous to a u-turn. *See id.*

[5] Although here there was no marihuana odor as in *Casteneda*, other circumstances in this case justify application of the *De Leon-Reyna* good faith exception. Unlike the situation in *Casteneda*, Coleman *could* reasonably conclude that it was unusual for Ramirez's truck to be on Pinon Road at that time. Coleman testified that he knew the truck did not belong to a Pinon Road resident or to one of their employees and that it was unusual for this truck to be on Pinon Road at this time. Also, the Pinon Road turnoff was so close to the checkpoint that an agent could reasonably believe that a truck, on seeing the checkpoint, turned off the road with the intent to avoid the checkpoint. The close proximity of Pinon Road to the border and the checkpoint, the notoriety of the road's use for illegal activity and to avoid the checkpoint, Coleman's knowledge of the normal traffic on Pinon Road, *especially* at 6:30 a.m., and the fact that Pinon Road is basically a road to nowhere, all generated Coleman's good faith belief that Ramirez was attempting to avoid the checkpoint and that the stop was legally based on the requisite reasonable suspicion. Under the *Brignoni-Ponce* criteria, and given the similarity to the turn-around cases, it was objectively reasonable for an experienced officer, situated as was Coleman, to reach this conslusion.

We hold that, under all the circumstances, agent Coleman acted with an objectively reasonable good faith belief that he had a reasonable articulable suspicion that

legally justified stopping Ramirez on Pinon Road.[4] The evidence seized at the checkpoint was hence admissible and Ramirez's conviction and sentence are affirmed.

AFFIRMED.

[4] We do not address whether the stop was constitutional, only that, considering together all the particular circumstances of this case, the stop was sufficiently justified under the good faith exemption to allow the fruits of the stop to be admitted in evidence.

APPENDIX B

No. 92-8085

Filed
NOV 18, 1992

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ERNESTO RAMIREZ-LUJAN,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10-23-92 , 5 Cir., 198__, ____F.2d__)

(November 18, 1992)

Before REYNALDO G. GARZA and GARWOOD, Circuit Judges and WERLEIN,* District Judge.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel

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* District Judge of the Southern District of Texas, sitting by designation.

nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ illegible

United States Circuit Judge